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08/479,215	06/07/1995	JOHN C. HARVEY		7966

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EXAMINER

MEHTA, BHAVESH M

ART UNIT	PAPER NUMBER
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2611

DATE MAILED: 09/05/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.
08/479,215

Applicant(s)
Harvey et al

Examiner
Bhavesh Mehta

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on Jul 8, 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 10, 11, 13, and 14 is/are pending in the application.
- 4a) Of the above, claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 10, 11, 13, and 14 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claims _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

*See the attached detailed Office action for a list of the certified copies not received.

- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____ 6) ☐ Other:

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Transitional After Final Practice

I. Since this application is eligible for the transitional procedure of 37 CFR 1.129(a), and the fee set forth in 37 CFR 1.17(r) has been timely paid, the finality of the previous Office action is hereby withdrawn pursuant to 37 CFR 1.129(a). Applicant's first submission after final filed on 1/6/99 has been entered. Supplemental amendments F filed 5/10/200 (paper # 21) and G filed 7/8/2002 (paper # 33) have been entered. Claims 10-11 and 13-14 are pending in the application.

II. It is examiners position that after a series of interview, it has been mutually agreed upon that the instant application is entitled the earlier priority date of 9/11/87 based on the 07/096,096 application and not the 11/3/81 date based on the 06/317,510 application. Therefore, the written description and the enablement under 112 1st paragraph should be limited to the 1987 specification only. Additionally, the remarks set forth in Paragraph III, items 1-30 of the instant office action are carried over from other office actions in similar cases and are presented herein because in the past there have been disagreements between the priority date that the applicants are entitled to. The examiner will withdraw paragraph III from subsequent actions in the instant application if applicants confirm on record in the next communication that the instant application is entitled to only the 1987 priority date and the citations for claim support will be only provided for the 1987 specification.

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III. During the present prosecution, many of the same issues have been raised in different ones of the many copending applications. In at least some cases, these issues appear to have been handled and addressed inconsistently between applications. Thus, the following “list” of positions taken by the examiner/Office in regard to such overlapping issues has been created, and will be maintained by the Office, in an attempt to ensure consistency in the way that these issues are handled between applications in the future.

THE EXAMPLES:

1) In lines 2-8 on page 142 of the amendment filed on 1/28/2002 in application SN 08/470,571, applicant suggests that the examiner has objected to the fact that applicant provided citations showing dual support for the claims with respect to both the 1981 and 1987 disclosures. No such objection has ever been raised by the examiner. To the contrary, the examiner found applicant's citations of dual support to be one of the most helpful aids that applicant has provided to date (i.e. when presented in the form of claim charts).

Having said this, the fact remains that examiner/Office was unquestionably misled by the many statements made by applicant concerning the

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“consequences” of Section 120 “priority”. The reason that these statements misled the examiner/Office seems to be self evident from the statements themselves. For example, in the last 7 lines on page 24 of the Appeal Brief filed in SN 08/113,329 on 9/17/1996, applicant states:

“The case law makes clear that the only inquiry concerning claims filed in a subsequent continuation application pursuant to Section 120 is whether they are adequately supported in under Section 112, first paragraph, in the initial application. If the support exists, the inquiry is at an end.”

And statements made in the remarks section of many amendments in which applicant states:

“The present application claims priority under 35 USC §120 of the following applications.....Consequently, Applicants will demonstrate disclosure only with respect to the ‘81 case,...”

[e.g. see lines 9-21 on page 000507 of the Appendix in the document mailed on 9/10/01 in SN 08/474,139]

These statements misled the examiner/Office into believing that, as a consequence of Section 120, applicant was permitted to use the disclosure of his

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1981 parent application alone, e.g. in place of the instant 1987 disclosure, to fulfill section 112 requirements when addressing/replying to Section 112 rejections.

However, the examiner/Office now understands that, because applicant's past 1981 parent disclosure was not incorporated into the instant disclosure, the 1981 specification cannot be relied upon by applicant for showings of section 112 support when addressing/responding to rejections made under Section 112; i.e. all section 112 Support must come from the instant "1987" disclosure alone.

The "*objections*" made by the examiner in 08/470,571 were raised because the examiner perceived a continuation, on the part of the applicant, of the same arguments that misled the examiner/Office in the first place. By raising these "*objections*", the examiner hoped to elicit a response from applicant acknowledging the fact that the instant "1987" disclosure was the only disclosure which could be used to fulfill the requirements of section 112 with respect to the limitations of the currently pending amended claims (the significance of the 1981 disclosure is relegated only to the secondary issue of Section 120 priority). The examiner wanted to be sure that the examiner and applicant were now on the same page concerning this issue. And, on at least one occasion, such an acknowledgment appears to have been provided by applicant [see the last 5 lines on page 141 of the amendment filed on 1/28/2002 in SN 08/470,571].

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2) Applicant does not believe that “common subject matter” is required for “priority” under Section 120. Instead, according to applicant, the only thing that applicant needs to do in order to obtain the earlier 1981 filing date for his pending amended claims is to show that each of his pending amended claims can be given different 1987 and 1981 claim interpretations which allows each claim to be supported, in parallel, by “different subject matter” from the 1981 and 1987 specifications.

“[Section] 120 does not require an applicant to demonstrate that the disclosures relied upon under §120 have anything in common besides their ability to separately comply with §112-1 with respect to the claims for which priority is sought. Accordingly, the Examiner’s focus on comparing the support from the two applications for similarity or common subject matter is improper and irrelevant because all applicants are required to do is satisfy §120 is show that each disclosure meets the requirements of §112-1 for a given claim.” (emphasis added)

[Page 141 of applicant’s response filed on 1/28/2002 in application S.N. 08/470,571]

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“Accordingly, the law requires a two part test in which the applicant separately demonstrates § 112 support for each application. In the FOA, the examiner distorts this straightforward test by imposing a third element of the test whereby the § 112 support from each application consists of ‘common subject matter.’”

[see the last 10 lines on page 137 of the response filed on 1/28/2002 in SN 08/470,571].

Applicant's position seems to be wrong.

“However, as mentioned earlier, a continuing application is entitled to rely on the earlier filing date of an earlier application only with respect to subject matter common to both applications” (emphasis added)

[In *Transco Products, Inc., v. Performance Contracting, Inc.*, 32 USPQ2d 1077 (**18)]

“Any claim in a continuation-in-part application that is directed solely to subject matter adequately disclosed under 35 U.S.C. 112 in the parent application is entitled to the filing date of the parent application.”

[In *Transco Products, Inc., v. Performance Contracting, Inc.*, 32 USPQ2d 1077 (**18)]

“Assuming the common inventorship, copendency, and cross-reference required by section 120, that section further requires only that the invention

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be disclosed in the parent application in such manner as to comply with the first paragraph of section 112 and be the same invention as that disclosed in the later application." (emphasis added)

[*Kirschner*, 305 F.2d 897 (C.C.PA1962)]

3) In the last 5 lines on page 141 of the response filed on 1/28/2002 in 08/470,571, applicant acknowledged that the 1981 application was not incorporated into the 1987 application. As a consequence, applicant also appears to understand that all Section 112 support must come solely from the "instant" 1987 disclosure if the requirements of section 112 are to be satisfied. If applicant knows such to be true, then it is not understood how applicant can still adopt the following position:

"the [examiner's] assumption that 'all limitations of the currently pending claims are necessarily directed to that which is described in the present 1987 disclosure' is mistaken and wholly unsupported."

[lines 8-10 on page 144 of the amendment filed in 08/470,571 on 1/28/2002].

Namely, if all section 112-1 support for all of the claims' limitations must necessarily come from the instant "1987" disclosure alone (e.g. in light that the disclosure of the 1981 parent was not formally incorporated into the instant 1987 disclosure), then how can a limitation of a claim be directed to (i.e. and obtain

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required section 112-1 support from) anything but that which is described within the said instant 1987 disclosure? Is applicant suggesting that the pending amended claims are **not** necessarily directed to, do **not** necessarily derive section 112-1 support from, and are **not** necessarily claiming, subject matter that is found in the instant 1987 disclosure?

4) Applicant has alleged that "Teletext decoders" did not "locally generate" the images that they outputted/displayed. According to applicant, Teletext decoders only transferred, to their outputs, displayable image data that was received at their inputs. The examiner rejects such a notion. The following is noted:

a) That, as was exemplified via the discussion provided on page 5 of the appendix that was attached to a 1981 "PETITION FOR RULEMAKING" submitted to the FCC , it was notoriously well known in the art that transmitted Teletext data *typically* comprised a "series of instructions" which instructed the Teletext decoders on how to "generate" the desired images which were to be outputted/displayed;

b) That conventional Teletext decoders *typically* comprised "character generators"; i.e. such "character generators" would not have been required had

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the received Teletext data actually comprised displayable image data as alleged by applicant; and

c) That transmitted Teletext data *typically* comprised of ASCII-type codes; i.e. wherein one of ordinary skill in the art would have understood the fact that these ASCII-type codes are not themselves displayable. Specifically, these ASCII-type codes only identified the way in which locally stored pixel patterns which were locally retrieved and locally assembled into image frames, e.g. via the “character generators”, in order to locally generate the images that were outputted/displayed.

Clearly, Teletext decoders operated to “*locally generate*” the images that they outputted and displayed!

5) Applicant’s 1987 inventions used a “SPAM” transmission packet structure to transmit ancillary information through the TV broadcast networks. By using the “SPAM” packet structure, a transmission scheme was established in which a piece of coherent “information”, e.g. such as a complete “processor instruction”, could be broken down into a plurality of “partial information” segments and communicated through the TV network within/as respective “discrete (packet) signals”. On the receiver side of the 1987 inventions, the partial information from the plurality of discrete signals could be recovered and re-organized back into

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the original piece of coherent “information (e.g. re-organized back into the single complete processor instruction).

Applicant has alleged the above described “partial information” transmission scheme is a key feature which distinguishes applicant’s alleged 1987 inventions over Teletext “prior art”. Applicant’s allegation is founded on a huge misunderstanding/misrepresentation of the Teletext “prior art”. In fact, via such arguments, it appears that applicant is effectively trying to re-invent the foundation on which the Teletext “prior art” was actually built [e.g. see the arguments which begin at the top of page 354 and extend to the bottom of page 356 in the response filed on 1/28/02 in SN 08/470,571].

Specifically, standardized Teletext was based on the recognition that vacant lines occurring during the VBI of TV signal transmissions could be used to transmit/communicate embedded frames/“pages” of character/graphics information along with the TV programming. However, it was instantly recognized that each video line did not have sufficient bandwidth to carry an entire frame/page of the character/graphics data. Therefore, the prior art Teletext systems established Teletext packet structures by which “partial image/information” segments (e.g. such as single “rows” of character and control information) could be communicated via respective discrete packetized signals

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which were embedded within respective discrete television line intervals. On the receiver side of the Teletext “prior art”, the partial information segments from the plurality of discrete packetized signals were recovered and re-organized back into the original frame/pages of character/graphics information in order to “locally generate” a Teletext image for display. But the clear correlation that exists between applicant’s “SPAM” transmission scheme and prior art Teletext transmission schemes does not end here!

In addition to the transmission of character/graphic frames/pages, those of ordinary skill in the art quickly recognized that the prior art Teletext transmission schemes could be “extended” so as to carry other kinds of information; e.g. “Telesoftware”(i.e. computer programming), remote control signaling, etc,... This additional information was carried using the same packetized Teletext structure previously established for the character/graphic image data. For example, Telesoftware was also broken down into “partial information” segments to be carried as “rows” of character-like data within respective Teletext packets of one or more Teletext pages (e.g. depending on the size of the Telesoftware program that was being communicated). On the receiver side, the “partial information” segments of the additional information were then recovered from the transmitted discrete packet signals and were re-organized back into its original

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form (e.g. the complete "Telesoftware" program was reconstructed from the discrete partial programming segments).

Given the above, it is still the examiner's position that applicant's 1987 packetized "SPAM" structure represents little more than applicant's own version of a conventional "extended" Teletext system [SEE part "A." under "Section XI" in the Office action mailed 8/27/01 in SN 08/470,571]. And again, for the reasons addressed above, the examiner continues to refute applicant's position that claim recitations directed to "discrete signals" and "partial information" contribute anything to avoiding applied Teletext "prior art"; i.e. applicant's allegations to the contrary represent nothing but "straw men."

6) Applicant points out that term "computer software/programming" has been defined as: "a series of instructions which controls the operation of a computer". Stretching this definition, applicant erroneously suggests that the term "computer software" encompasses: "**any** series of instructions which controls the operation of a computer". And finally, using this improperly stretched definition, applicant argues that each series of transmitted cuing-type codes which were described in his 1981 parent application *implicitly* taught the transmission and/or downloading of "computer software" in view that each of these series of codes represented "instructions which controlled the operation of a computer". Applicant's argument

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is lame. For if one were to accept applicant's argument, then in applicant's new world:

- a) a computer mouse and computer keyboard suddenly become generators of "computer software" because they too generate series of instructions which are used to control the operation of a computer;
- b) Teletext data itself, when received by a CPU implemented decoder, suddenly becomes "computer software" because it too represents series of instructions which are used to instruct a computer as to how to generate an image for display;
- c) etc,...

Clearly, applicant's argument twists the definition of "computer software" in a way that is repugnant to its conventional use/meaning in order to obtain a 1981 effective filing date for something that he did not have in his possession, and/or did not disclose, until 1987; e.g. namely, the downloading of computer software.

[note: parts "15)" and "16)" of this section too]

7) While applicant has alleged that his "computer software/programming" recitations should be stretched so as to retroactively find support from things which were not "computer software/programming" (i.e. a series of cuing-type codes/signals from his 1981 disclosure), applicant also takes the opposite approach by alleging that circuit structures which operated to process signals (i.e.

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specifically Teletext decoders) are not encompassed by the “signal processor” recitations of his pending amended claims. The examiner disagrees. The examiner points out that not only are Teletext decoders “signal processors” in any conventional sense of such terminology, but that Teletext decoders are in fact “signal processors” specifically within the context of applicant’s own alleged invention. More to the point, the Teletext decoders of the applied prior art are like “SPAM” decoders of applicant’s alleged inventions in that both decoders operated to extract and process packets of encoded information distributed to them, at least “*preferably*”, via the VBI of broadcasted and/or cable casted TV programming; i.e. wherein the packets of encoded information comprised Teletext data packets in the case of prior art Teletext decoders and comprised SPAM data packets in the case of the SPAM decoders of applicants alleged invention.

Being such, applicant’s allegation that conventional Teletext decoders should somehow be excluded by the “signal processor” recitations of his pending claims seems to fall under the heading of: “NONSENSE.”

8) The examiner maintains that applicant’s own “SPAM” transmission system, at least as described in the context of television distribution, constitutes little more than applicant’s own version of an “extended Teletext system” However, when

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Teletext "prior art" has been applied against applicant's claims, applicant has become hostile to the suggestion that there is any correlation between his "SPAM" transmission system and conventional Teletext transmission systems. Yet, on the other hand, applicant appears to openly believe that the scope of many of his pending amended claims encompasses the "WEATHER STAR" system/receiver technology which, to the extent understood by the examiner, is in fact a Teletext based technology. If applicant's claimed/disclosed "SPAM" systems/receivers encompass Teletext based systems/receivers such as the "WEATHER STAR" system/receiver technology, then how in the world can applicant possibly suggest that "SPAM" and Teletext are not correlated/analogous technologies/arts with respect to the applied prior art? Clearly there is a conflict between the two positions.

9) Applicant and applicant's originally filed 1987 disclosure both seem to have alleged that "digital television signals/programming", of the type that is recited in many of applicant's pending amended claims, was notoriously well known in the art at the time of his alleged invention. The examiner has challenged applicant's apparent allegations and has requested that applicant submit "prior art" to show such to be true. In response to the examiner's requests, applicant has submitted U.S. Patent #3,906,480 to Schwartz et al. as having evidenced the conventional

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“digital television signal” technology on which his disclosure and amended claims were/are allegedly based [note the last 11 lines on page 97 and lines 3-6 on page 98 of the amendment filed on 6/7/2000 in SN 08/470,571]. The examiner continues to be mystified by this submission. The examiner points out that the cited Schwartz et al. patent describes a computer display system in which a computer was used to generate, albeit digitally, *frames* of vector encoded graphic/character information which were then transferred, via a data bus, to “digital TV monitors” for display thereon. As far as the examiner can tell, the Schwartz et al. disclosure has absolutely nothing to do with the transmission of “digitized TV signals/programming” in any conventional sense of such terminology. Simply trying to figure out how the Schwartz et al. patent might be related to anything that was originally disclosed by applicant in his 1987 disclosure, much less trying to figure out how it could have been used to enable that which was originally disclosed by applicant in his 1987 disclosure, represents an insurmountable invitation to experimentation unto itself. If Schwartz et al. has been cited by applicant out of carelessness, then its submission to the Office for required review and consideration represents nothing less than an unnecessary drain on already limited PTO resources. If, on the other hand, Schwartz et al. was cited out of necessity (e.g. if it actually represents the best showing of his

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“digital television” recitation that applicant is/was aware of), then its very presence in the record only goes to support the examiner’s position that which is now claimed by applicant, i.e. via the subsequently introduced “digital television” recitations, is not supported and/or enabled by applicant’s originally filed 1987 disclosure.

10) Applicant has made many attempts to have the Zaboklicki reference [DE 2,914,981] removed from consideration. In many responses [e.g. the communication filed 7/13/2000 in 08/470,571], applicant has argued that the applied Zaboklicki reference should be removed from consideration simply because the teachings and descriptions provided by this applied prior art reference differ from teachings and descriptions provided by other non-applied members of its patent family (namely, GB #2,016,874). Such a position is absurd. If Zaboklicki DE 2,914,981 teaches that which applicant now claimed, then the fact that Zaboklicki GB #2,016,874 might not have provided these same teachings (even if true) is irrelevant to the fact that the claims ARE unpatentable over Zaboklicki DE 2,914,981.

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11) Within the originally filed abstract of applicant's 1981 past parent specification (i.e. note S.N. 06/317,510), the term "*programming*" was explicitly defined to mean:

"everything transmitted over television or radio intended for communication of entertainment or to instruct or inform".

[see lines 4-7 in the abstract of US patent #4,694,490]

Today this definition is in conflict with applicant's present needs (e.g. it too refutes applicant's claim to the earlier 1981 priority date). Being such, applicant has argued that this explicitly stated definition should be ignored and given no weight because the "abstract", as applicant alleges, was not *technically* part of his 1981 written description. The examiner rejects this allegation too. The examiner points out: that the originally filed abstract was certainly part of the originally filed disclosure of applicant's 1981 parent application on which all issues must be considered/based and that the definition of "programming" that was provided by this originally filed abstract is completely consistent with the way that it was used throughout the 1981 disclosure.

12) Applicant seems willing to acknowledge that the "1987 inventions" that are described in the instant 1987 CIP specification are in at least in some ways

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enhanced and improved versions of the 1981 inventions that were described in applicant's past 1981 parent specification.

“In fact, both [the 1981 and 1987] specifications describe the inventions disclosed in the 1981 specification, although the 1987 specification contains many enhancements and improvements.”

[see the last two lines on page 9 of applicant's supplemental response filed 5/6/02 in SN 08/470,571]

One of the “enhancements and improvements” that was effected via the subsequent filing of instant 1987 CIP specification was a change made to the definition of the word “programming.” Whereas the past 1981 Parent specification defined the terminology as referring to Television and Radio transmissions, the instant 1987 specification “improved and enhanced” the 1981 definition of “programming” to explicitly cover “all forms of electronic transmission” now explicitly including “computer programming”, “broadcast print”, etc,... (e.g. additions to the radio/TV transmission of the past 1981 definition).

“everything that is transmitted over television or radio intended for communication of entertainment or to instruct or inform”;

[“programming” as defined in the past 1981 Parent specification]

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“everything that is transmitted electronically to entertain, instruct, or inform including television, radio, broadcast print, computer programming, as well as combined medium programming”.

[“programming” as defined in the instant 1987 CIP specification]

Thus, whereas a potential infringer might have reasonably argued that any claim which derives its required section 112-1 support from the past 1981 specification cannot be fairly read on subject matter outside the Television and Radio transmission arts given the 1981 definition of “programming” (e.g. that these claims cannot be fairly read on computer software/programming transmissions), the wiggle room for such arguments has been effectively eliminated when the identically worded claims derive their required section 112-1 support from the instant 1987 CIP specification instead; i.e. being that the 1987 specification replaces the 1981 definition of “programming” with the new “improved and enhanced” 1987 definition of “programming” which has been expanded to explicitly covers “all forms of electronic transmission” including, i.e. explicitly, said “computer programming” transmissions. Thus, the examiner asks:

Why should any applicant be allowed to improve/enhance/redefine the subject matter that is being recited by a given claim using the new subject matter that was added via a subsequently filed CIP

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specification, e.g. in order to tighten the noose on existing potential infringers and/or to cast a wider net to ensnare new potential infringers, and yet still be entitled to the earlier filing date of a past un-incorporated 1981 Parent specification that did not contain this improved/enhanced/redefined subject matter?

(The short answer to this question is: NOT!)

The point being that applicant had every right to draft a claim based on his past 1981 parent specification which contained the 1981 definition of “programming”, and to have taken the position that a fair reading of the 1981 “programming” terminology, e.g. in the context of said past 1981 parent specification, encompassed “computer programming” transmission too; i.e. wherein such an “argument” would have been necessary in view that the 1981 definition of “programming” did not include “computer programming”. Instead, applicant elected to draft a new CIP specification which modified the definition of “programming” to explicitly include “computer programming” thereby eliminating any question that the fair reading of “programming”, in the context of the new 1987 CIP, now encompasses “computer programming”. Again, the examiner asks:

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Why should any applicant be allowed to improve/enhance/redefine the subject matter that is being recited by a given claim using new subject matter that was added via a subsequently filed CIP specification, e.g. in order to tighten the noose on existing potential infringers and/or to cast a wider net to ensnare new potential infringers, and still be entitled to the earlier filing date of a past un-incorporated 1981 Parent specification that did not contain this improved/enhanced/redefined subject matter?

(E.G. Why does applicant believe that his new 1987 definition of "programming" should be entitled to the 1981 filing date of the old 1981 "programming" definition which it replaced?; Why should applicant's "1987 inventions", which have been re-defined by the new 1987 definition of "programming", be entitled to the 1981 filing date of "past 1981 inventions" which were defined by the past 1981 definition of "programming?"; etc,...)

13) In order to try to overcome applied prior art of record, applicant has willfully and repeatedly alleged that the Radio and Television broadcast arts represent non-analogous arts. This position is absurd and wholly unsupportable too. The examiner points out that the Television broadcast art actually evolved from the radio broadcast art because the original radio broadcast networks represented existing entities who had the program distribution resources and expertise that

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was easily extended and applied to TV programming; e.g. NBC, CBS, ABC all began as Radio distribution networks which evolved, quite “naturally”, into Television broadcast networks too [NOTE: the last 5 lines of the first paragraph of the first column on page 811 of the article “Versatile Transmission Video Facilities at NBC New York” by Mausler which states that: “the origins of television broadcasting practice may be found in radio” (a copy of which was provided within SN 08/470,571)]. In fact, the most significant difference (i.e. if not the only “real” difference) between Radio and Television distribution networks is the difference in bandwidth of the equipment that is required to handle Radio and Television program distributions. Thus, for example, when Hetrich [Australian #74,619] stated that his disclosed “Netcue” system was applicable to either “a network of radio or television stations”, one of ordinary skill in the art would have recognized that this teaching was in fact founded on the underlying understanding that Radio and Television network were in fact analogous arts. Applicant’s allegations to the contrary is based on a unrealistically low level of skill in the art.

14) Throughout the prosecution of their patent portfolio, applicant has alleged that the “***simultaneous or sequential presentation***” recitation, as found in many of their pending claims, represents a “key limitation” in overcoming and/or avoiding

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“prior art” of record [note: lines 2-6 on page 17 of Appendix A in the response filed on 3/19/2001 in SN 08/469,078; and part “4)” under “Section VII” of the Office action mailed 8/27/01 in SN 08/470,571]. The examiner strongly disagrees. Specifically, the examiner points out that the alternative expressions “*simultaneous or sequential*” or “*one of a simultaneous and sequential*” simply encompasses ANY AND ALL of the ways by which two types of information could ever be presented to a given audience. Specifically, any time two types of information are presented to a given audience, they must necessarily be presented to that audience either *simultaneously or sequentially* in time. The phrase “*simultaneous or sequential*” simply covers ALL of the possibilities! Thus, if one can show that a given piece of “prior art” operated to present two types of information to a given audience, then one has in fact inherently shown that the prior art meets the “*simultaneous or sequential presentation*” limitation of applicant’s claims; i.e. again, the recitation “*simultaneous or sequential*” simply covers ALL of the way that two types of data could ever be displayed to a single audience!

15) Applicant has alleged that his past 1981 Parent specification “implicitly” taught the downloading of “computer programming” (i.e. computer *software*).

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“To the contrary, the 1981 definition [of “programming”] implicitly includes, and the 1987 definition [of “programming”] explicitly includes, computer programming in the definition”.

In an attempt to create support for this erroneous allegation, applicant tries to weave together a tapestry of “engineered” teachings and definitions:

A) Applicant falsely asserts that the past 1981 Parent specification literally used the term “programming” to refer to the “instruction signals” that were communicated through the TV/RADIO networks of its disclosed “1981 inventions”;

B) Applicant notes that the “instruction signals” of the past 1981 specification were described as comprising signals which instructed ***preprogrammed*** microcomputers to perform given tasks.

C) Applicant cites an outside *Dictionary* definition of the term “program” to show that the term “program” was conventionally used to refer to “computer programming/software”; and

D) Finally, applicant argues that when one combines the above “engineered” teachings from his past 1981 Parent specification together, based on the cited *Dictionary* definition of “program”, one “implicitly” arrives at the cited *Dictionary* definition of “program.”

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However, for a variety of reasons, the tapestry which applicant attempts to weave falls apart at the slightest touch:

A) When one actually looks at the way in which the 1981 “programming” terminology was coined and used throughout applicant’s past 1981 Parent specification, i.e. the context in which it actually appears, one finds that the 1981 “programming” terminology unquestionably referred to signaling which represented scheduled TV/Radio shows (and not to “computer software” as applicant now wishfully alleges). In this regard, one finds that applicant’s past 1981 Parent specification distinctly distinguished the 1981 “instruct signals” from the 1981 “programming” into which said 1981 “instruct signals” were embedded. Specifically, the past 1981 parent specification leaves absolutely no doubt that said 1981 “instruct and information signals” constituted ancillary/auxiliary signaling that was “associated” with, and embedded within, respective TV/Radio “programming”:

“One method provides a technique whereby a broadcast or cablecast transmission facility can duplicate the operation of a television studio automatically through the use of instructions and information signals embedded in programming either supplied from a remote source or sources or prerecorded” (emphasis added)

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[lines 32-37 of column 3]

“Signal processor, 71, has means, described above, to identify and separate the instruction and information signals from their associated programing and pass them, along with information identifying the channel source of each signal, externally to code reader, 72.” (emphasis added)

[lines 3-7 of column 11]

“The cable head end facility contains signal strippers, 81, 85, and 89, of which models exist well known in the art, that controller/computer, 73, can instruct to remove signals from the programing as required, and signal generators, 82, 86, and 90, also known in the art, that controller/computer, 73, can instruct to add signals to programming as required”

[lines 36-42 of column 12]

“One particular advantage of these methods for monitoring programming is that, by locating the identifier signals in the audio and/or video and/or other parts of the programing that are conventionally recorded by, for example, conventional video recorders, ...”

[lines 25-29 of column 16]

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“Methods for Governing or Influencing the Operation of Equipment that is External to Conventional Television and Radio Sets by Passing Instructions and Information Signal that are Embedded in Television and Radio Programing Transmissions to Such External Equipment” (emphasis added)

[Lines 34-38 of column 17]

“Signal processor apparatus have the ability to identify instruction and information signals in one or more inputted television and radio programing transmissions” (emphasis added)

[lines 39-41 of column 17]

“Microcomputer, 205, is preprogrammed to respond in a predetermined fashion to instruction signals embedded in the “Wall Street Week” programing transmission....These [embedded instruction] signals instruct microcomputer, 205, to generate several video graphic overlays...” (emphasis added)

[lines 42-49 of column 19]

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“At this point, an instruction signal is generated in the television studio originating the programming and is transmitted in the programming transmission” (emphasis added)

[lines 60-63 of column 19]

Given the above, it still seems ridiculous for applicant to suggest that the term “programming”, e.g. in the context of the past 1981 specification”, referred to “computer software” (or even that it referred to applicant’s 1981 “instruct and instruction signals”).

B) It is also quite clear from applicant’s 1981 past parent specification that the “microcomputers” on the receiver side of the disclosed 1981 inventions were **“preprogrammed”** with the “computer programming/software” which told them how to respond to detected “instruct signals” that were embedded within received TV/Radio “programming.” More specifically, it seems quite apparent that each of the 1981 “instruct signals” of applicant’s 1981 inventions represented typical cuing-type signals/commands which instructed/triggered **“preprogrammed”** microcomputers to execute respective portions of preprogrammed software in order to perform predefined task/operation (e.g. the 1981 “instruct signals” told the 1981 microcomputers “to generate the overlay” whereas the pre-loaded 1981

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computer programming/software told said 1981 microcomputers “how to generate the overlay that was to be generated”).

“Microcomputer, 205, is preprogrammed to respond in a predetermined fashion to instruction signals embedded in the “Wall Street Week” programing transmission....These [embedded instruction] signals instruct microcomputer, 205, to generate several video graphic overlays...”
(emphasis added)

[lines 42-49 of column 19]

Clearly, contrary to applicant’s erroneous allegations, there is no teaching in applicant’s past 1981 specification indicates that applicant’s 1981 “instruct signals” represented “computer software/programming” in any conventional sense of such terminology.

C) The past 1981 parent specification does not offer/provide a signaling mechanism and/or structure which would have been capable of handling the large continuous sequence of data bytes required to push “computer software” through TV and/or Radio networks. Such a signaling mechanism and structure was not provided until “SPAM” packeting was introduced via applicant’s subsequently filed instant 1987 CIP specification. Thus, applicant’s past 1981 parent specification was not enabling of the alleged “computer

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programming/software" feature (i.e. the alleged "computer programming/software" feature that the past 1981 specification did not even describe/disclose).

16) On page 150 of the amendment filed 1/28/2002 in 08/470,571, applicant states:

"The 1981 specification states:

It is the object of this invention to unlock this potential by the development of means and methods which permit programming to communicate with equipment that is external to television receivers and radio receivers, particularly computers and computer peripherals such as printers

1981 Spec., Col. 1, ll.36-41

Thus applicants' 1981 specification makes it clear that 'programming' is not just TV and Radio shows- it can also include instructions, codes, and signals that are communicated to and control e.g., computers and computer peripherals. These instructions, codes, and signals clearly fall within the definition of programming and to find otherwise is to conveniently and purposefully overlook the entire purpose of the invention." (emphasis added)

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The examiner disagrees with applicant's analysis as to the meaning of the cited excerpt. In reading the 1981 Specification, it seems that "**the *entire purpose***" to which applicant alludes was the ability to provide multimedia presentations in which TV or Radio "programming" was be displayed along with another supplemental media presentation; wherein the content of the supplemental media presentation was related to the content TV and Radio "programming" thereby *enhancing* the content of the displayed TV and Radio "programming". To achieve this goal, ancillary "instruct signals" and/or other ancillary "information signals" were "associated" with, and "embedded" within, the TV or Radio "programming." These embedded "instruct and information signals" allowed received TV and Radio *programming* "to communicate" with equipment that was external to the TV and Radio receivers in order to produce the supplemental media presentation. Specifically, the associated "instruct and information signals", which were embedded within the received Radio or TV "programming", were themselves transferred to the external equipment thereby causing the external equipment to produce said supplemental media presentations. Being such, it is still crystal clear to the examiner that the 1981 "programming" terminology was used in a conventional sense by the 1981 specification so as to

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refer to TV and Radio signaling which represented scheduled TV and Radio shows. To suggest otherwise is to conveniently and purposefully ignore the fact that applicant's 1981 specification clearly distinguished the associated "instruct and information signals" as being separate/distinct entities with respect to the "programming" (i.e. the radio/TV shows) into which these associated "instruct and information signals" were embedded:

"One method provides a technique whereby a broadcast or cablecast transmission facility can duplicate the operation of a television studio automatically through the use of **instructions and information signals embedded in programing** either supplied from a remote source or sources or prerecorded" (emphasis added)

[lines 32-37 of column 3]

"Signal processor, 71, has means, described above, **to identify and separate the instruction and information signals from their associated programing** and pass them, along with information identifying the channel source of each signal, externally to code reader, 72." (emphasis added)

[lines 3-7 of column 11]

"The cable head end facility contains signal strippers, 81, 85, and 89, of which models exist well known in the art, that controller/computer, 73, can instruct **to remove signals from the programing** as required, and signal generators, 82, 86, and 90, also known in the art, that controller/computer, 73, can instruct **to add signals to programing as required**" (emphasis added)

[lines 36-42 of column 12]

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"One particular advantage of these methods for monitoring programming is that, by locating the **identifier signals in the audio and/or video and/or other parts of the programing** that are conventionally recorded by, for example, conventional video recorders, ..." (emphasis added)

[lines 25-29 of column 16]

"Methods for Governing or Influencing the Operation of Equipment that is External to Conventional Television and Radio Sets **by Passing Instructions and Information Signal that are Embedded in Television and Radio Programing Transmissions to Such External Equipment**" (emphasis added)

[Lines 34-38 of column 17]

"Signal processor apparatus have the ability to **identify instruction and information signals in one or more inputted television and radio programing transmissions**" (emphasis added)

[lines 39-41 of column 17]

"Microcomputer, 205, **is preprogrammed to respond in a predetermined fashion to instruction signals embedded in the "Wall Street Week" programing transmission....**These [embedded instruction] signals instruct microcomputer, 205, to generate several video graphic overlays..." (emphasis added)

[lines 42-49 of column 19]

"At this point, **an instruction signal is generated in the television studio originating the programming and is transmitted in the programming transmission**" (emphasis added)

[lines 60-63 of column 19]

17) Applicant clearly failed to carry his original 1981 disclosure forward into the instant 1987 disclosure. Because of this, applicant has forfeited his right to now claim any subject matter that was set forth in the disclosure of his originally filed

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1981 parent application, but was not carried forward into the disclosure of his originally filed 1987 parent application. Thus, APPLICANT IS CLEARLY WRONG when he alleges that he can secure a 1981 priority date for that which is now claimed by showing "possession" of that which is now claimed via the original disclosure of his 1981 parent application (i.e. NOT for the subject matter that was left behind!). Specifically, not only must applicant show that he possessed the subject matter that is now claimed with respect to the original 1981 disclosure but, more importantly, applicant must first show possession of the same claimed subject matter with respect to the instant 1987 disclosure. Stated another way, to secure priority, applicant must be able to show that he did not forfeit his right to claim the subject matter possessed in his originally filed 1981 parent application by showing, *independently*, that he possessed this same subject matter via the originally filed disclosure of his present application too (i.e. with 1987 disclosure).

18) Applicant is only entitled to claim subject matter which was set forth within the originally filed 1987 disclosure of his present application in accordance with ALL of the requirements of section 112-1. Specifically, the examiner refutes applicant's allegations that the original disclosure of his 1981 parent application can be used in place of the instant 1987 disclosure to meet one or more of the

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section 112-1 requirements (namely, to establish “possession” of that which is now claimed). It is only after proper section 112 support (i.e. including “possession”) has first been established for the pending claims from the disclosure of the present application (the 1987 disclosure), that there is even a need to consider applicant’s 1981 parent application at all. Simply put, if the pending claims are not supported under section 112-1 by applicant’s present disclosure as originally filed, then the pending claims themselves fail to comply with the requirements of section 112-1 and no further questions need be asked. Again, because applicant failed to formally/properly incorporate his 1981 disclosure into his 1987 disclosure, applicant is prohibited from relying on his 1981 disclosure to supplement his present 1987 disclosure (i.e. at least as far as complying with the requirements of section 112-1 is concerned). Stated another way, because applicant’s 1981 parent application was never formally incorporated into applicant’s present 1987 disclosure, it does not constitute part of applicant’s 1987 disclosure, i.e. the *instant disclosure*, from which all section 112-1 support for the currently pending amended claims must be derived.

19) As was noted above, applicant does not believe that “common subject matter” is a requirement for priority under section 120.

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“[Section] 120 does not require an applicant to demonstrate that the disclosures relied upon under §120 have anything in common besides their ability to separately comply with §112-1 with respect to the claims for which priority is sought. Accordingly, the Examiner’s focus on comparing the support from the two applications for similarity or common subject matter is improper and irrelevant because all applicants are required to do is satisfy §120 is show that each disclosure meets the requirements of §112-1 for a given claim.”
(emphasis added)

[Page 141 of applicant’s response filed on 1/28/2002 in application S.N. 08/470,571]

“Accordingly, the law requires a two part test in which the applicant separately demonstrates § 112 support for each application. In the FOA, the examiner distorts this straightforward test by imposing a third element of the test whereby the § 112 support from each application consists of ‘common subject matter.’”

[see the last 10 lines on page 137 of the response filed on 1/28/2002 in SN 08/470,571].

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Being such, applicant does not even pretend that the subject matter that is now being claimed in his many applications represents "common subject matter" between the instant 1987 CIP specification and the past 1981 parent specification. Instead, applicant is happy to allege the benefit of section 120 priority for that which is claimed based only on alleged "correlated subject matter" between his 1987 and 1981 specifications; e.g. NOTE:

- a) That Appendix C of applicant's response filed 6/7/2000 sets forth alleged "correlations" between respective 1981 and 1987 disclosures; and
- b) That the claim by claim showing of alleged 1981 and 1987 section 112 claim support in Appendix A of applicant's response filed 6/7/2000 seem to regurgitate many of the alleged "correlations".

The examiner, on the other hand, believes that "common subject matter" is in fact a requirement of section 120. Thus, the examiner maintains that applicant's allegations pertaining to the existence of "correlated subject matter" are irrelevant to the issue of section 120 priority because "common subject matter", not "correlated subject matter", is required under section 120.

An extreme example of just how far applicant has been willing to distort section 120 in an effort to obtain the 1981 priority date for ones of the pending amended claims can be found in the claim chart for claim 123 within APPENDIX A of

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applicant's response filed 6/7/2000 in SN 08/470,571. In this claim chart, applicant alleges that the recitations of claim 123 find section 112-1 support via the "Super Discount Supermarkets" embodiment of the instant 1987 disclosure while alleging that this claimed 1987 "Super Discount Supermarkets" embodiment is entitled to the 1981 filing date of the parent application based on the 1981 "Wall Street Week" embodiment. The examiner disagrees. Specifically, the examiner maintains that the 1987 "Super Discount Supermarkets" embodiment and the 1981 "Wall Street Week" embodiment do not constitute "common subject matter" and therefore the claimed 1987 "Super Discount Supermarkets" embodiment is not entitled to the 1981 filing date of the 1981 "Wall Street Week" embodiment as alleged.

20) In lines 3-7 on page 11 of the supplemental response filed 5/06/2002 in SN 08/470,571, applicant states:

"the starting point for determining whether an applicant is entitled to priority under section 120 is what is being claimed. Without identifying precisely what is being claimed, it is impossible to seriously undertake an analysis of whether sufficient support exists in both applications thus entitling applicants to a 1981 priority date".

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The examiner was a bit surprised that applicant raised this issue after all of the section 112-1 requests which have been made by the Office throughout the present prosecution in hopes of getting applicant's clarification as to *precisely what it is* that applicant claims. In fact, the Office continues to struggle in its efforts to make such determinations for the 10,000 or so pending amended claims. In the past, when applicant has been asked to identify "*precisely what is being claimed*", applicant has declined to provide such showings instead opting to take the positions:

A) That it is the examiner's job, not applicant's, to read and understand the 557 pages of applicant's current 1987 CIP specification in order to determine "precisely what it is being claimed" via applicant's 10,000 or so pending claims; and

B) That at least some of the limitations of applicant's 10,000 or so pending claims are actually directed to subject matter that is not described within in the instant 1987 CIP specification.

"the [examiner's] assumption that 'all limitations of the currently pending claims are necessarily directed to that which is described in the present 1987 disclosure' is mistaken and wholly unsupported."

[lines 8-10 on page 144 of the amendment filed in 08/470,571 on 1/28/2002].

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Hence applicant does not wish to cite, or indeed is unable to cite, section 112-1 support from the instant CIP disclosure for these limitations [e.g. often times out of an expressed fear that a court, at some later date, might actually hold the scope/meaning of these limitations as being directed to subject matter that was actually disclosed within the instant 1987 CIP specification].

In regard to the section 112-1 issue that has now been raised by applicant, the following positions continue to be taken by the present examiner:

A) It has always been a desire of the Office to determine “precisely what it is” that applicant now claims. Being that it still remains so unclear as to “precisely what it is” that applicant now claims, clarification on the part of applicant is once again formally requested for the 10,000 or so pending claims. For the record, the current examiner has found applicant’s claim charts of alleged “dual” section 112-1 support to be the most helpful form of aid that applicant has provided to date because it at least attempts to match each claimed limitation to the specific teachings in the specification(s) that they are allegedly directed; and

B) The examiner continues to adopt the positions expressed by Judge Luckern at the ITC:

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1) “that the specification of the ‘277 patent [the 557 pages of the instant 1987 specification] is difficult to understand, as it is dealing with many possible systems”;

2) “that despite complainant’s [i.e. the current applicant’s] attempts to point to the specification of the ‘277 patent [the 557 pages of the instant 1987 specification] as illustrative of some claim elements, said specification has not been helpful in connecting individual claim language to distinct statements in the specification of the ‘277 patent that is supposed to provide an explanation of the claimed systems in issue”;

3) “that complainant’s [i.e. the current applicant’s] assertions in many instances of where support in the specification of the ‘277 patent [the 557 pages of the instant 1987 specification] can be found for claimed elements ‘reads like the directions to a treasure hunt. There’s a piece here, there’s a piece there, it’s in there somewhere.”; and

4) “ that the specification of the ‘277 patent [the 557 pages of the instant 1987 specification] and the claims in issue ‘are like ships

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passing in the night in the same ocean, but not necessarily sailing in the same direction.”

[SEE: 1997 ITC Lexis 307, *258 (part I of II)]

Once again, the examiner hereby requests applicant’s help in determining “precisely what it is” that applicant now claims.

21) The examiner notes that the “SPAM” technology, on which the “more sophisticated” systems of applicant’s present 1987 disclosure are based, is vastly different from the “cuing-type signal” technology on which the “primitive” systems of applicant’s 1981 parent application were based; e.g. the ability of SPAM to carry and distribute “software” being but just one of the more notable differences. Clearly, the “more sophisticated” 1987 alleged inventions that are now *necessarily being claimed* are not entitled to the 1981 filing date of their 1981 “primitive” ancestors; i.e. applicant is not allowed to transport his “more sophisticated” 1987 alleged inventions back in time to the 1981 filing date of his different, albeit sometimes “correlated”, “primitive” 1981 alleged inventions.

22) The issues cited above illustrate a further dilemma that the examiners have faced when trying to read and understand that which is now being claimed by

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applicant. Specifically, terminology which might seem definite when one looks to the instant 1987 disclosure alone, becomes confusing and indefinite when read in light of applicant's responses; responses in which applicant has applied newer 1987 interpretations/definitions to the claims in order to establish section 112-1 support and has applied older and different 1981 interpretations/definitions to the same claims in order to obtain the 1981 priority date for the recitations (this approach is evident throughout appendix A of applicant's last response). Thus, at times, it seems to be the record itself that has, or that has at least contributed to, making the meaning and scope of the claims' recitations so unclear. It must also be noted that the claim recitations themselves are often contorted in the attempt to craft them to read independently on different teachings from the two disclosures. Not only does this process results in claim limitations that are difficult to read in that they do not quite fit teachings from either disclosure, but more importantly, the effort involved in this process is wasted effort because the subject matter being claimed/referenced in the two disclosures is not "common subject matter"; e.g. the claims are not entitled to the 1981 filing date even if it could be shown that they can be read on respective (but different) subject matter from the two disclosure (a situation that is also quite evident from appendix A of applicant's last response).

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Even so, given a record in which applicant continues to argue that his pending claims are entitled to the 1981 priority date because they can be read in different ways on the 1981 and 1987 disclosures, a situation is created in which the “broadest reasonable meaning” of a claim’s limitations takes on one meaning when defined by the file history itself (e.g. when based on applicant’s attempt to read each claims’ limitations, improperly, onto two completely different disclosures), and takes on a different meaning when defined, properly, from the originally filed 1987 disclosure by itself. Should the examiner apply the “prior art” according to the interpretations afforded by applicant’s 1987 disclosure alone (as is proper), or should the examiner apply the “prior art” according to the interpretations created by applicant via his improper reliance on different subject matter from the different 1981 and 1987 specifications? No matter how you cut it, the result is confusion!

23) The following position taken by Judge Rich demonstrates that “continuity of disclosure”, needed to establish the benefit of priority under section 120, requires continuity of “common subject matter” in a form that meets all of the requirements of section 112-1; e.g. even continuity of “best mode”.

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“It must be understood that the introduction of a new best mode disclosure would constitute the injection of ‘new matter’ into the application and automatically deprive the applicant of the benefit of the earlier filing date the parent or original application for any claim whose validity rests on the new best mode disclosure”.

TRANSCO [38 F.3d 551; 32 U.S.P.Q.2D (BNA) 1077]

24) At times, applicant seems to be of the opinion that *only* the “enablement” requirement of section 112-1 applies to the issue of “continuity”. At other times, applicant seems to be of the opinion that *only* the “description” requirement of section 112-1 applies to the issue of “continuity”. On its face, one of these two positions must be wrong (i.e. they are mutually exclusive). In reality, both positions are wrong. As evidenced above, *ALL* of the requirements under section 112-1 apply to the issue of “continuity” (e.g. even “best mode”). Being such, applicant is only entitled to the benefit of an earlier filing date for claims that are directed to “common subject matter” for which “continuity” has been maintained between the present and the earlier filed application. “Continuity of common subject matter” exists between applications only when there is:

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- A) Continuity of “written description” between applications for the subject matter being claimed (as defined under section 112-1);
 - B) Continuity of “enablement” between applications for the subject matter being claimed (as defined under section 112-1); *and*
 - C) Continuity of “best mode” between applications for the subject matter being claimed (as defined under section 112-1).
- [note sections 14 and 15 above]

Being such, none of applicant’s currently pending amended claims are entitled to the priority date of applicant’s 1981 parent application in that the claims are not directed to “subject matter” for which there is has been:

- a) the required continuity of “written description” between applications;
- b) the required continuity of “enablement” between applications; *and*
- c) the required continuity of “best mode” between applications.

25) It is understood that CIP practice allows an applicant to file a new application containing additional/new subject matter while preserving the applicant’s right to claim (and the right to the earlier filing date for) subject matter which was

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previously disclosed in the parent application. But an applicant's right to claim subject matter from the parent application is only preserved for that subject matter of the parent application which has actually been carried forward (e.g. *incorporated*) into the disclosure of the CIP. Any and all subject matter from the parent application that is not carried forward into the disclosure of the CIP cannot be legally claimed within said CIP; i.e. the right to claim subject matter that is left behind is lost/forfeited with respect to said CIP application. To prevent such a loss/forfeiture, it is common for an applicant to draft the disclosure of his CIP application so that it literally incorporates the entire disclosure of the parent application, e.g. either physically or "by reference", thereby literally carrying forward all of the subject matter from the parent application into the CIP application and in doing so:

A) Preserving applicant's right to claim any/all of the subject matter from the parent within said CIP application; and

B) Preserving applicant's right to the filing date of the parent application for any/all claims which are directed to the subject matter of the parent application that has been carried forward into the CIP application.

In contrast to the common CIP practice described above, when filing his 1987 CIP disclosure, the present applicant elected to draft an entirely new specification

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and elected not to formally incorporate the disclosure from his 1981 parent application in its entirety. In fact, when filing his 1987 CIP disclosure, applicant elected to draft the entirely new specification in a way which makes it difficult to impossible to determine if any of the subject matter from his 1981 parent was carried forward into the disclosure of his CIP. Today, faced with the fact that subject matter which was not carried forward (i.e. *incorporated*) into the present disclosure has been lost/forfeited, applicant takes a leap of faith by suggesting that all of the subject matter from his 1981 parent application somehow/miraculously found its way into the new disclosure of his 1987 CIP. Clearly, this is not true. In fact, when one studies the two disclosures in detail, one actually finds that little to none of the subject matter from the 1981 parent made it into the 1987 CIP disclosure in a form that constitutes "common subject matter". For example, even the subject matter from the two disclosures which looks similar at first glance, is based on vastly different transmission technologies, different scopes/meaning/interpretations, and on a new "best mode" [e.g. note Appendix II of the Office action mailed 8/27/01 in SN 08/470,571]. Being such, it does not appear that any of applicant's currently pending amended claims are entitled to the 1981 date of applicant's parent application.

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26) In the past, applicant seems to have suggested that even if one were to find that applicant's 1981 disclosure had not been carried forward into applicant's later filed 1987 disclosure, one/applicant could still rely on said 1981 disclosure to provide an understanding of the later filed 1987 disclosure with respect to issues under section 112. The examiner notes that only "prior art" can be used for such purposes. Therefor applicant's 1981 can only be used to clarify/supplement his 1987 disclosure if it is found to be "prior art" with respect to the 1987 disclosure. But if the 1981 disclosure is "prior art" for applicant's suggested purpose (i.e. for the purpose of understanding the later filed 1987 disclosure), then it must be "prior art" for issues under sections 102 and 103 too. Thus, for applicant to suggest that his 1981 disclosure be used as "prior art" for the purpose of understanding his 1987 disclosure seems to put applicant, at least potentially, on a very slippery slope; i.e. because if applicant's position were ever *legally* accepted, then applicant's 1981 disclosure would *legally* become "prior art" against the 1987 disclosure for sections 102 and 103 issues too.

27) The examiner notes that many of applicant's pending claims recite the following receiving station structures: a) a receiver; b) a signal detector; c) a

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processor; and d) an output device. Appendix A of the response filed on 6/7/2000 in SN 08/470,571 shows that:

- a) the recited "receiver" refers to nothing more than --a TV tuner--;
- b) the recited "signal detector" refers to nothing more than a decoder 203 which extracts and error corrects embedded information from the VBI of TV programming;
- c) the recited "processor" refers to nothing more than microcomputer 205; and
- d) the recited "output device" refers to nothing more than a "TV monitor".

The examiner maintains that all of these recited structures are found within a conventional CPU/MP/computer implemented Teletext receivers. For example, note:

- a) the TV tuning element (2);
 - b) the extracting and decoding circuitry 8 and 11;
 - c) the processing element (13); and
 - d) the TV monitor/display (6),
- of BETTS [GB 1,556,366].

Such further highlights the direct correlations that exists between the "SPAM" distribution system of applicant's alleged invention and the "Teletext" distribution

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systems of the “prior art”. Again, the examiner believes that applicant’s “SPAM” is, for all intents and purposes, synonymous with conventional “Extended Teletext” [note part “5)” of this section];

28) Applicant’s originally filed instant disclosure clearly taught away from the “interactive” ultimate receiver station configuration which has been claimed during the present prosecution [note claim 56 as presented in the amendment filed 6/7/2000 and 7/13/2000 in 08/470,571]. Namely, as originally described, one of the key advantages that was allegedly offered by applicant’s alleged inventions was the fact that the “ultimate receiver stations” produced their respective personalized audio/video presentation “automatically” and without any manual input from the viewer; e.g. whereby the complex processing that was involved within the system remained hidden from, and transparent to, the viewer/user;

SEE:

A) lines 27-34 on page 11 of applicant’s instant disclosure as originally filed;

B) lines 18-20 on page 91 of applicant’s instant disclosure as originally filed;

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C) lines 13-34 on page 427 of applicant's instant disclosure as originally filed;

D) etc,...

Despite this original teaching, applicant has subsequently attempted to introduce pending amended claims into the record which, according to applicant's own allegation (see the support for claim 56 as was set forth in APPENDIX A of the amendment filed on 6/7/2000 in SN 08/470,571), recite an "interactive" implementation of the originally disclosed non-interactive "ultimate receiver stations". The section 112-1 problem is immediately apparent [also note the arguments set forth in latest Office action of SN 08/470,571].

29) As originally described, it appears that the "ultimate receiver stations" of applicant's alleged invention produced the combined image of applicant's figure 1C by (apparently) additively mixing the images of figures 1A and 1B in their entirety; i.e. this fact seems to explain why the "line" of figure 1A had to be produced "on a background color that is transparent when overlaid on a separate video image" as was described in applicant's originally filed disclosure [see lines 9-14 on page 25 of applicant's instant disclosure]. Despite this original teaching, applicant now attempts to introduce claims which recite a process in which the

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respective images are now combined in less than their entirety and/or in which one portion of one image is “replaced” by a portion of another. The section 112-1 problem is immediately apparent [note the latest Office action in SN 08/470,571].

30) In the first two lines under the heading “*a. Independent Claim 56 and Dependent Claims Thereto*” on page 287 of the response filed 1/28/2002 in SN 08/470,571, applicant alleges that the publication date of the applied Gunn et al article was never established by the Office. This allegation is untrue. The following is noted:

- a) This Gunn et al. article was originally submitted by applicant for consideration within voluminous IDS citations. However, as with many of these citations, applicant never provided the Office with information regarding the publication date of the article;
- b) The Gunn et al. article has been applied by the Office against many of applicant’s pending claims, and while applicant never provided the Office with the article’s publication date, the Office was able to establish the date in question and notified applicant of it accordingly [note: the PTO- 892 of paper #2 in the present 08/470,571 record; the PTO-892 of paper #20 in SN 08/447,502; etc,...];

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c) Again, the publication date for this Gunn et al. article, e.g. an article that was submitted by applicant for consideration against the pending amended claims, is March 26-28 of 1980. This date is, by any standard, valid “prior art” against all of applicant’s pending claims.

IV. DRAWINGS

1. The drawings are objected to under **37 C.F.R. § 1.83(a)**. The drawings must show every feature of the invention specified in the claims. Applicant's claims recite a number of embodiments of the invention. However, no embodiment appears to be shown in its entirety in any of the drawings, and therefore the structural relationships between elements as recited in the claims are not shown in the drawings. The following claimed features are not shown in the drawings: specific combined medium programming; interactive mass medium output apparatus; first combined medium programming; first and second portions of combined medium programming and the computer output of the combined medium programming. If Applicant believes every claimed feature as indicated above is present in the drawings, in his response to this objection, he should point out the specific figures and elements in the drawings which show these features. These features must be shown or the features canceled from the claims. No new matter should be entered.

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V. 112 1ST PARAGRAPH REJECTIONS

1. Claims 10-11 and 13-14 are rejected under 35 U.S.C. 112, first paragraph, as containing new matter and/or subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

37 C.F.R. 1.75(d)(1) requires that:

“the terms and the phrases used in the claims must find clear support or antecedent basis in the description so that the meaning of the terms in the claims may be ascertainable by reference to the description”.

In related ITC investigation No. 337-TA-392, the Administrative Law Judge found:

- 1) “that the specification of the ‘277 patent [the 557 pages of the instant 1987 disclosure] is difficult to understand, as it is dealing with many possible systems”;
- 2) “that despite complainant’s [the current applicant’s] attempts to point to the specification of the ‘277 patent [the 557 pages of the instant 1987 disclosure] as illustrative of some claim elements, said specification has not been helpful in connecting individual claim language to distinct statements in the specification of the ‘277 patent that is supposed to provide an explanation of the claimed systems in issue”;

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3) “that complainant’s [the current applicant’s] assertions in many instances of where support in the specification of the ‘277 patent [the 557 pages of the instant 1987 disclosure] can be found for claimed elements ‘reads like the directions to a treasure hunt. There’s a piece here, there’s a piece there, it’s in there somewhere.’”; and

4) “ that the specification of the ‘277 patent [the 557 pages of the instant 1987 disclosure] and the claims in issue ‘are like ships passing in the night in the same ocean, but not necessarily sailing in the same direction.’”

[SEE: 1997 ITC Lexis 307, *258 (part I of II)]

The examiner continues to adopt these same positions in regard to the pending amended claims currently at issue.

The following terms and phrases in independent claims 10, 11, 13 and 14 do not find clear support or antecedent in the descriptive portion of the specification:

specific combined medium programming; interactive mass medium output apparatus; first combined medium programming; first and second portions of combined medium programming and the computer output of the combined medium programming.

In advancing this rejection, the Examiner has followed the “Guidelines for Examination of Patent Application Under 35 U.S.C. 112, first paragraph, “Written

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Description Requirement” (Federal Register/Vol. 66, No. 4/Friday, January 5, 2001/Notices) to the extent applicable. The claims are either newly added claims or pending claims with new limitations. There are no original claims remaining in the application.

For example, claim 11, also representative of claim 10, recite:

11. A method for delivering specific combined medium programming for use with an interactive mass medium program output apparatus, comprising the steps of:

receiving generally applicable information for use in a combined medium programming transmission station;

Generating said specific combined medium programming; and

transmitting said specific combined medium program, a first portion of said specific combined medium programming enabling said interactive mass medium program output apparatus (I) to prompt a subscriber for input in respect of a second portion of said specific combined medium programming, (ii) receive said input from said subscriber, and (iii) deliver said second portion of said specific combined medium programming on the basis of said input.

However, Appellant's specification, nowhere is the claimed invention disclosed expressly, implicitly or inherently, as required in the Written Description Guidelines, supra. In fact, the critical components and features called for in the claims are nowhere to be found either in the

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specification or in the drawing figures. For example, claim 11 recites “specific combined medium programming” which is found nowhere within the specification or the drawings figures. Similarly, the first and second portion of the specific combined medium programming recited in claim 11 are not supported by the original disclosure. The specification offers mere possibilities without any of the details necessary to indicate that Appellant actually had possession of the proposed claim 11. Even if all the cited phrases were some how combined together, which is not described or shown in the figures, the claim language of claim 11. The examiner has carefully searched Appellant's lengthy specification looking for the features enumerated above. While the some words above do occur at several places in the specification, none of them describe the features in the claims, nor do they reasonably convey to one skilled in the relevant art that Appellant had possession of the claimed invention at the time the application was filed. Similarly, claims 10, 13-14 are analyzed and similarly rejected.

Applicant does not give sufficient details to enable one of ordinary skill in the art to carry out the claimed invention without undue experimentation and delay with regard to the interconnections with the various other elements, nor how the various signals are processed and transmitted to the other system elements.

These claim limitations are not described in the application as filed. Therefore, the requirement for an adequate written description has not been met.

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2. Claims 10-11 and 13-14 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

Any analysis of whether a particular claim is supported by the disclosure in an application requires a determination of whether that disclosure, when filed, contained sufficient information regarding the subject matter of the claims as to enable one skilled in the pertinent art to make and use the claimed invention. The test of enablement is whether one skilled in the art could make or use the claimed invention from the disclosures in the patent coupled with information known in the art without undue experimentation. *United States v. Teletronics, Inc.*, 857 F.2d 778, 8 USPQ2d 1217 (Fed. Cir. 1988); *In re Stephens*, 529 F.2d 1343, 188 USPQ 659 (CCPA 1976); *In re Wands*, 858 F.2d 731, 8 USPQ2d 1400 (Fed. Cir. 1988).

While the prior art setting may be mentioned in general terms, the examiner submits that the essential novelty, the essence of the invention, must be described with greater particularity than that exhibited in this application.

For example, claim 11, also representative of claim 10, recite:

11. A method for delivering specific combined medium programming for use with an interactive mass medium program output apparatus, comprising the steps of:
receiving generally applicable information for use in a combined medium programming transmission station;

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Generating said specific combined medium programming; and transmitting said specific combined medium program, a first portion of said specific combined medium programming enabling said interactive mass medium program output apparatus (I) to prompt a subscriber for input in respect of a second portion of said specific combined medium programming, (ii) receive said input from said subscriber, and (iii) deliver said second portion of said specific combined medium programming on the basis of said input.

However, nowhere in Appellant's specification is contained sufficient information regarding the subject matter of the claims as to enable one skilled in the pertinent art to make and use the claimed invention. In fact, the critical components and features called for in the claims are nowhere to be found either in the specification or in the drawing figures. For example, claim 11 recites "specific combined medium programming" which is found nowhere within the specification or the drawings figures. Similarly, the first and second portion of the specific combined medium programming recited in claim 11 are not supported by the original disclosure.

The examiner has carefully searched Appellant's lengthy specification looking for the features enumerated above. While the some words above do occur at several places in the specification, none of them describe the features in the claims, nor do they reasonably convey to one skilled in the relevant art that Appellant had possession of the claimed invention at the

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time the application was filed. Similarly, claims 10, 13-14 are analyzed and similarly rejected.

Under the circumstances, one of ordinary skill in the art would be burdened with undue experimentation in trying to make and use the claimed invention. Also, the disclosed invention cannot be construed as having been "communicated to the interested public in a meaningful way." MPEP, *supra*. The examiner believes he has a reasonable basis for questioning the sufficiency of the disclosure. The burden has, therefore, shifted to the Appellant to come forward with convincing evidence - facts, not unsupported conclusions to rebut this challenge. *In re Ghiron*, 169 U.S.P.Q. 723 (1971). *In re Brown*, 177 J. S. P. Q. 691 (1973). *In re Doyle*, 179 U. S. P. Q. 227 (1973).

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention. (emphasis added).

Finally, the disclosure fails to show how the various structures must be interconnected, timed and controlled so as to obtain the operations suggested by the applicant. Applicant has therefore placed an enormous burden on one of ordinary skill in the art in trying to carry out the claimed invention. The above-noted deficiencies are significant individually. With all of them combined, it is fairly clear that the descriptive portion of the specification lacks sufficient

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details to enable one of ordinary skill in the art to carry out the invention without undue experimentation and delay.

VI. 112 2nd PARAGRAPH REJECTIONS

1. Claims 10-11 and 13-14 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Considering claim 10, the claim is vague and indefinite for not providing sufficient antecedent reference for: "first combined medium programming" (lines 4 -5 : does this refer to the 'specific combined medium programming' recited in lines 1-2, or different?); "interactive mass medium program (lines 1-7); "said specific combined medium programming" (lines 12-13; does this refer to 'combined medium programming' -lines 4-5 , or only to lines 1-2 'specific.. programming' or all three 'combined' recitations ?). What is the difference between the combined medium programming and specific combined medium programming? What is an interactive mass medium program output?

Considering claim 11, similar arguments as to claim 10 apply herein. Additionally, the claim does not provide sufficient

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antecedent recitation for: "combined medium programming" (lines 4 - 5; does this refer to the 'specific' in line 1); "said specific combined medium program" (lines 6 and 7 respectively; does the refer both to the 'specific recitation' on line 1 and the 'combined medium programming' -line 4 or just the first and not the second?); "combined medium programming" (lines 7-8; which recitation does this refer to?); "combined medium programming" (lines 9-10; does this refer only to line 4 or to all of lines 4, 1, 6, and 7 or a sub-combination?); "said specific combined medium programming" (lines 11-12). Additionally, the claim is vague and indefinite when it refers to "receiving generally applicable information". What is generally applicable information? What is the first portion and the second portion of the combined medium programming? What is the difference between the first and the second portion of combined medium programming? Additionally, claim 11 is indefinite when it recites the phrase "for input in respect of a second portion of said specific combined medium programming" at lines 9-10. The phrase is both confusing as well as grammatically incorrect.

Considering claims 13-14, arguments above with respect to claims 10-11 apply herein also. Additionally, claim 13 is indefinite at line 6 when it recites "outputting for input". Is output being

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outputted or is being input being outputted? Additionally, claim 13 is indefinite at the last line when it recites "combined medium programming including computer output". What is a computer output with respect to the claimed inventions? Similarly, with respect to claim 14, claim 13 is indefinite at the last line when it recites "combined medium programming including computer output". Also, how is mass medium programming and computer programming originated. What programming is applicant referring to? Is mass medium programming same or different than the computer programming.

VII. CLAIM REJECTIONS

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

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2. claims 10-11 and 13-14 are rejected under 35 U.S.C. 102(b) as being anticipated by Saeki et al (U.S. patent no. 4,455,570) (already of record).

The following rejections are made with Examiner's best understanding of scope of claims. Any amendment to overcome rejection under 35 U.S.C. 112 that changes Examiner's understanding of claim scope may necessitate citation of new art.

Saeki disclose a system in figures 1 and 2(a) which provides an interactive method for the delivery of specific information for use with a mass medium program output apparatus (i.e. main box 10) dependent upon an input from a subscriber. The mass medium program output apparatus (10) outputs combined medium programming (i.e and audio) via the television receiver (11) and has an input device (i.e. keyboard 44) to receive an input from the subscriber. As is shown in figures 4-8 of Saeki et al., the subscriber is prompted for an input request of specific information (e.g. weather forecast, shopping info, stocks, etc.). And, as depicted in fig. 2(b), the address circuit (39-6) of the logic controller (39 memory for storing a code, i.e. the address of the subscriber terminal. Subsequent to prompting the subscriber for receipt of specific information, the subscriber

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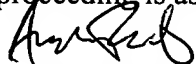
inputs, via the input device (44), his selection. The output apparatus (10) further comprises a processor (i.e. logic controller 39) for processing the subscriber's selection and communicates a selected code (designating the subscriber's selection) for transmission to a remote site (i.e. center 1) such that mote site is aware of what type of information was selected by the subscriber (note col. 6, 16-28). Subsequent to the remote site (1) receiving the subscriber's selection, the remote site transmits over the CATV network messages corresponding to the selected information to the receiver at the output apparatus (10) (note col. 6, lines 28-39). The selected information, upon reception by the output apparatus, is delivered to the television receiver (11) for presentation to the subscriber (note col. 6, line 40 to col. 7, line 2). Further note col. 7, lines 3-28. Additionally, the transmission station (i.e. center 1) receives an information transmission via signal receiving antenna (13) and generates a combined medium im via a source group (14). Additionally, re claims 13-14, the arguments addressed above apply herein. Referring to figures 1 and 2(a) of Saeki et al., at the center (1) information is received (via source group 14) to be transmitted; inherently an instruct signal is received by the interactive mass medium program output apparatus (10) which


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effects the receiver station (11) to generate a combined medium program (i.e. to generate the menu). In response to receiving the instruct signal, the output apparatus (10) prompts the subscriber for an input request of specific information (e.g. weather forecast, shopping info, stock quotes, etc., figs. 4-8); receives and processes a reply (i.e. selection) from the subscriber via the keyboard (44); communicates a code indicative of the selected information to a remote station (1) (note lines 4-11; and receive messages from the remote station to satisfy the subscriber's selection (note col. 7, lines 15-28). The center (1) further uses a transmitter control signal (i.e. a carrier signal) and transmits the information, the instruct signal and the transmitter control signal output apparatus (10) to perform the selection process by the subscriber.

VIII. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Bhavesh Mehta whose telephone number is (703)308-5246. The examiner can normally be reached on Monday-Friday from 8:00 AM to 5 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Andrew Faile, can be reached on (703) 305-4380. The fax phone number for the organization where this application or proceeding is assigned is (703)872-9314.


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